No. 82-624

Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

G. CECIL HARTLEY, and
TRAVIS DELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED FOR REVIEW

1. The test to be applied in and remedies available to defendants in criminal cases where the government is responsible for the mishandling, loss and/or destruction of evidence are in conflict among the first, second, third, fifth, ninth, eleventh and D.C. circuits.

2. What is the proper test to protect defendants' right to a fair trial and fundamental fairnes when the government deliberately mishandles material evidence likely to be exculpatory, depriving the defendants of the opportunity to test that evidence for the characteristics that are the alleged fraud and conspiracy for which said defendants had been indicted?

3. What is the proper test to protect the defendants' right to fundamental fairness where the government, in attempting to prove its allegations that it was defrauded by the defendants' sale of defective products to it, tests only a limited quantity of the product, destroys the tested sample in the process, and then deliberately destroys the remainder of the product in its possession, thereby depriving the defendants of an opportunity to independently test any of the product?

4. Does the circuit court test in *Hartley* sufficiently recognize and protect the constitutional rights of a defendant where the government has mishandled material evidence that is likely to be exculpatory thereby depriving the defendants of the opportunity to test the evidence for the characteristics alleged in the indictment to constitute the elements of the frauds and conspiracy charged?

5. There is a significant argument that the Eleventh Circuit test in *Hartley* fails to recognize the due process implications of the destruction and mishandling of evidence that is potentially exculpatory.

6. Does the test in *Hartley* recognize and protect a defendant's rights to due process of law when the government has destroyed and mishandled potentially exculpatory evidence, thereby precluding the defendants from independently testing the evidence for the characteristics alleged in the indictment to constitute the elements of the frauds and conspiracy charged?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

On June 17, 1982, the Court of Appeals entered judgment affirming the convictions of petitioners herein. *United States of America v. G. Cecil Hartley, et al.*, 678 F.2d 961 (11th Cir. 1982). A copy of the opinion is attached to the appendix of co-defendant Treasure Isle, Inc., which defendant is in the process of petitioning this Court to issue a writ of certiorari. An order denying a Petition For Rehearing And For Suggestion For Rehearing En Banc was entered September 8, 1982. A copy of the order appears in the Appendix. (A).

JOINDER IN CO-DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

Petitioners herein, G. Cecil Hartley and Travis Dell, were indicted with co-defendant Treasure Isle, Inc., and are parties who are jointly and severally interested in the judgment of the Eleventh Circuit Court of Appeals entered June 17, 1982 affirming the convictions of each of the defendants, and the order of that court denying the co defendant Treasure Isle's Petition For Rehearing And Suggestion For En Banc consideration dated September 8, 1982. Petitioners herein, in accordance with Rule 19.4, *Supreme Court Rules,* do hereby join in the petition for writ of certiorari of co-defendant Treasure Isle, Inc. to review the aforesaid judgment of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 17, 1982, affirming Petitioners' convictions herein. A timely Petition For Rehearing And En Banc Consideration was filed. The Order Denying the Petition is dated September 8, 1982. This Petition is filed within sixty days of that decision and is therefore timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fundamental right to a fair trial in the United States is implicit in Article III Section 2(3) of the United States Constitution, and the Fifth and Sixth Amendments to the United States Constitution.

United States Constitution, Amendment V:

> No person . . . shall be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, . . . and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On August 8, 1979, a federal grand jury returned a 33-count indictment naming Treasure Isle, Inc., Mr. Hartley, Dell, and Patterson as Co-Defendants (XCV II 1-15)*

The Defendants proceeded to trial before a jury in the United States District Court for the Middle District of Florida on an indictment which alleged a scheme to defraud the United States through the use of the mails, a conspiracy to defraud the United States, interstate transportation of money obtained by fraud, and a RICO violation. The Defendants Hartley, Dell and Treasure Isle, were all convicted of the 33 counts; the Defendant Patterson was acquitted.

Treasure Isle, Inc., is a publicly-held Florida corporation which has been in existence since the early 1950's. Treasure

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*"Record on Appeal" and the "Supplemental Record on Appeal" are consecutively numbered in Roman Numerals from I through CVIII. The transcripts are paginated in the upper right-hand corner in Arabic Numerals. The exhibits introduced as evidence at the Pre-Trial hearings and at the trial will be referred to by "Ex" preceded by the initial of the party introducing the exhibit and followed by the identification number or letter utilized by the trial court clerk.

Isle produces frozen breaded seafood products, primarily shrimp, which are sold throughout the United States. During the time period pertinent to this case its average annual revenue was 37.95 million dollars (T.I. EX. 1L), and a small portion of this revenue came from the sale of frozen breaded shrimp to the United States Department of Defense for consumption by military personnel (TI. Ex. 1L, 61A). The company's production of frozen breaded shrimp for consumption by the military provided the basis for the 33-count indictment. Petitioner Hartley at all material times served as one of Treasure Isle's vice presidents and its production manager, and Mr. Dell was the plant superintendent in charge of the day-to-day production activities of Treasure Isle. (LVIII, p.6194-96, p.6200-6202, p. 6235-38).

Reduced to its simplest form, the Government alleged in the indictment that Treasure Isle and Petitioners agreed among themselves to defraud the Defense Department by submitting false claims to the Government in connection with the sale of frozen breaded shrimp that allegedly did not conform to contract requirements. The Government contract contained a detailed list of criteria to be used for inspection purposes by the Government. That criteria included the presence of foreign matter, dehydrated areas, the existence of black spots greater than one-eighth inch, texture, color, size, weight and percentage of breading.

Although Treasure Isle entered into hundreds of contracts with the Defense Department for frozen breaded shrimp between 1970 and 1978 (TI Ex. 51), the substantive counts of the indictment focused upon but 14 of those contracts.

Generally, the process for breading shrimp entails first cleaning, pealing, splitting and deveining the shrimp. The

processed shrimp are coated with meal, batter, breading, and then frozen.

After a day and one-half of deliberations, the jury sent a note to the trial judge stating that it was *"hopelessly deadlocked"* and could not reach a verdict (LXXVI, p. 7964). The note further explained that a portion of the jury *"rejects all prosecution testimony as untrue"* and *"a fabric of lies"* (emphasis added) (LXXVI, p. 7964). The trial court then gave a supplemental instruction to the jury in which he asked the minority and majority to re-examine their respective judgments in order to arrive at a unanimous verdict. The next afternoon, after three days of deliberation, the jury returned guilty verdicts on all 33 counts as to Treasure Isle, Mr. Hartley and Mr. Dell.

The factual predicate for the issues raised herein begins some time in 1976, when the U.S., through Mr. Kirkgessner of the Defense Investigative Services, Department of Defense, conducted a criminal investigation of the activities of Petitioners and Treasure Isle, Inc., (hereinafter referred to as T.I.). The investigation was to determine whether any of the Petitioners committed any criminal acts in connection with T.I.'s production and delivery of frozen breaded shrimp to the United States (Vol. CIII, p. 1866). T.I. sold and delivered to the U.S. frozen breaded shrimp from 1960 through 1979. (Vol. CI, p. 1126).

In May, 1979, the Defendant, T.I. and Petitioners learned for the first time, that they were the object of a criminal investigation by the U.S. concerning the Company's compliance with specifications contained in contracts between the Company and the Government.

Counsel for petitioners contacted the Department of Justice in order to determine the nature and extent of the investigation by the Government. In response to that inquiry the Department refused to discuss the then pending investigation except to state that it was criminal in nature and was being considered by a Federal Grand Jury.

By letter dated June 6, 1979 ("G" attached to Hartley's Motion in Limine to Limit Government's Proof, to Dismiss and to Suppress), Mr. Levine requested that *all product sold by T.I. to the U.S. from June 10, 1978 through May 16, 1979, be preserved in order to permit independent testing and examination of the product still in the hands of the Government.* On June 25, Mr. Levine forwarded a follow-up letter ("H" attached to Hartley's Motion) and the U.S. replied by two letters dated July 22. ("H" and "I").

The indictment was not returned until August 8, 1979, more than a year and one-half after the Government testing of the T.I. product. (Vol. XCVII, p. 1).

On December 13, 1979, the Government filed a response to Treasure Isle's Motion to Dismiss Due to Non-Compliance with Magistrate's October 10, 1979, Order ("B" attached to Hartley's Motion). In its pertinent part, the response stated that:

> "In December, 1977, when Government inspectors assigned to Treasure Isle became aware that their samples of frozen breaded shrimp were being tampered with, certain measures were undertaken to verify this fact. When verification was confirmed, the inspectors identified two lots that had been subjected to sample tampering: F6869 and F7008. The contract that these two lots were shipped out on (DS-135-78-C 5150; C 5158) were placed on hold at the three designation points. An examination was conducted of the 529 cases

> comprising the two lots in question. A few cases that had specified markings upon them were identified and seized as evidence. Certain boxes within various cases were also found to contain special markings that were significant; they were also seized as evidence and segregated. The balance of the shipment was subjected to a quality audit to determine conformance with contractual specifications. To effectuate such an audit, random samples of the boxes were selected and their contents tested. *The shrimp that was subjected to such testing are consumed;* consequently, a quality audit results in a slight reduction of the total quantity of shrimp. The results of the audit revealed the shrimp to be grossly nonconforming: this indictment followed." (Emphasis added)

The audits (test results) referred to were received by Mr. Hartley after the indictment was returned. The initial audit and report is dated January 19, 1978, *some 16 months prior to any Petitioner having any knowledge of the investigation.* (Exhibit "C" attached to Hartley's Motion).

In addition to the aforesaid test results, additional testing was done by the Government and all of those test reports were presented in evidence before the Court in connection with the evidentiary hearing on the pending Motions.

The Government conscientiously and systematically destroyed (consumed) all product sold to it by T.I. except for a very limited quantity of product that failed the Government tests. (Vol. 1, p.37-94). *Except for the limited quantity of non-conforming product preserved by the Government, no other product was retained by the Government that the Defendants could test in order to*

establish that the product conformed to the contract requirements.

Except for the testimony of the Government auditors regarding the limited quantity of shrimp that came into their possession for the purpose of testing, which was an infinitesimal amount of the product sold by T.I. to the Government, no Government witness ever testified that *any specific product lot or any specific contract sold to the Government did not conform to the contract specifications.* ("Only a relatively small amount of shrimp purchased by the Government from Treasure Isle is still in existence and available for inspection and testing by the Defendants in the case." Excerpt from Court Order June 11, 1980, (Vol. C III, p. 1865, App. B) (Only several hundred pounds were tested out of 3,000,000 pounds of shrimp sold.) The former T.I. employees who testified as Government witnesses spoke only in generalities regarding in-plant irregularities during the period described in the indictment.

To counter and rebut both the Government auditors' testimony and the testimony of the former T.I. employees, Petitioners tried to present the product itself as the best evidence of its quality. However, no product was available because the Government's mishandling of the product it had preserved and thereby prevented its testing for the characteristics that the Government claimed evidenced the fraud perpetrated on it.

To the extent Petitioners were able to obtain from the *Government* files and records test results that contradicted the testimony of the Government's witnesses, it presented that evidence. *One example of the true quality of the T.I. product is found in the Jacksonville audit reports of Contract C-5112, done in January and April, 1979.*

The product described in Contract C-5112 was delivered to the Government on or about January 2, 1979. The product was tested and audited by the Government and the report of that audit is on U.S. Department of Commerce Form 89-822 and is dated *April 3, 1979* (Vol. IV, p. 374-392). The report and each attachment thereto shows that, based on the testing done by Government employees at a Government facility, in the presence of D.I.S. (Criminal Investigators) at Jacksonville, Florida, at a point in time that the product was in the exclusive custody of the Government, *the product, in every respect, satisfied the contract specifications as set out in the contract between the Government and T.I.* On January 3, 1979, Contract C-5112 was tested for the *first time* at Jacksonville, Florida, (after the product had left T.I. and was in the exclusive custody of the Government), which tests were performed by agents and employees of the U.S. The January test results established that the product, in every respect, satisfied each aspect of the contract specifications. (Vol. IV, p. 374-392). *The product described in contract C-5112 was shipped from T.I. to the Government before any of the Defendants had any knowledge of the criminal investigation.*

By virtue of the fact, that on the date of the indictment, (1) in excess of 99.9% of the product that was sold was no longer available for testing (the Government had consumed the product. In spite of the June 6, 1979 demand to preserve a random sample of the product for independent testing by the potential defendants); and (2) *due to the Government's mishandling of the product that was retained, the product could not be tested* for all of the attributes called for by the contract between the parties *that was identified* in the indictment as representing fraudulent conduct on the part of the Defendants, the Petitioners were denied the fundamental fairness guaranteed to them

by the Due Process Clause of the Fifth and Sixth Amendments.

In the order of the Court denying the Petitioner's Motion to Dismiss, Suppress and In Limine (which order was entered just prior to closing argument), the Court made the following findings of fact. (App. B):

> "In January, 1978, military inspectors at the Treasure Isle plant attempted to verify their suspicion that the inspection process was being subverted by employees of Treasure Isle. Certain steps were taken toward this end in connection with production lot nos. F6968 and F7008. After the inspectors' suspicions were verified to their satisfaction, the inspectors notified their superiors as to what they had found. Thereafter, the shrimp which was produced under these two production lots were shipped to various destinations pursuant to three separate Government contracts. The last four digits of these contracts were 5168, 5150, and 5153. Orders were given to place the shrimp from these lot numbers on hold for later testing. On two occasions during the early part of 1978, shrimp from these lot numbers were tested for compliance to Government specifications. A substantial portion of these lots were preserved and have been made available to the Defendants for testing. *However, due to subsequent thawing and refreezing, and normal deterioration, the shrimp from these two lots cannot be tested for some of the characteristics which are pertinent to this case, such as breading percentage and count per pound. All other shrimp produced by Treasure Isle and sold to the United States Government has been consumed, or, in the words of the Defendants in this case, systematically destroyed."* (Emphasis added)

As it relates to the significance of the unavailability of the shrimp for testing, the Court in its Order, found that:

> "The Court must agree with the Petitioners in this case that *the missing shrimp is both material and subject to varying expert opinion.* While the consumption of the shrimp was 'intentional', there is no evidence that there was an improper governmental motive in this case. The advisability of the continuing purchases of shrimp from Treasure Isle after January, 1978, may be questioned, however, once that shrimp was purchased, it was not unreasonable for it to be consumed. *The Government has stated no intention of introducing any results of tests performed on shrimp that was later consumed."* (Emphasis added)

The Court concluded that, although Petitioners were denied any potential benefits from the testing that they may have performed, so too was the Government deprived of test results which may have been beneficial to its case. Accordingly, the Court then denied Petitioners' Motions. (Vol. CIII, p.1864-71). During the trial, the limited quantity of non-conforming product that the Government preserved, together with the test results for that product from Lots F6968 and Lots F7008, were admitted in evidence before the jury. It was based solely upon the testimony describing the results of the testing of these two lots by Sgt. Jackson in January 1978 (Vol. XXXiX, pp. 4306, 4313-42) by Sgt. Baily in March 1978 (Vol. XL, pp. 4427-75, Vol. SLI, p. 4496-4536) and Sgt. Reimers in February and March of 1978 (G. Exs. 17A, 17B, 17C) (Vol. XXXVI, pp. 3971-74, 3998-4052) that the Government attempted to establish the allegations in the indictment by "independent evidence." The Government contended this "independent evidence" corroborated the vague and general testimonial evidence of the former T.I.

employees. Without this "independent evidence," the Government could not have prevailed in this case.

If the Government had not destroyed (consumed) and had it properly preserved (not mishandled) the product on hand *after* it had determined that there was probable cause to believe a crime had been committed and that Petitioners were participants therein, *then the Petitioners through impartial testing would have had "independent evidence" to present to the jury and thereby raise a reasonable doubt as to their guilt of the charges.*

The destruction (consumption) and mishandling of the product is particularly material when one considers what occurred during the course of the deliberation of the jurors. After a day and one-half of deliberations, the jury sent a note to the trial judge stating that it was "hopelessly deadlocked" and could not reach a verdict (Vol. LXXVI, p. 7964). The note further explained that a portion of the jury *"rejects all prosecution testimony as untrue"* and *"a fabric of lies."* (Emphasis added) (Vol. LXXVI, p. 7964). The judge then gave the jury supplemental instructions and the following afternoon, after three days of deliberation, the jury returned guilty verdicts on all 33 counts set out in the indictment.

The Government, through the witness Reimers, presented evidence that certain product was nonconforming and presented photographs of product tested by him that were a part of production Lots F6968 and F7008. (G. Exh. 17A, 17B, 17C). *Reimers also testified that the photos and test results of the samples were representative of the entire lot* (Vol. XXXVII, p. 4063-65). Although these lots were kept and not consumed, they were not properly preserved by the Government and, as a result, *could not* be used for testing by T.I. or any independent examiner. (See testimony of Dr. Rao and of the

Chief U.S.D.C. Inspector, Vol. LXIV, p. 6831-6878, and Vol. II, p. 130-223).

Although the Government's counsel, in cavalier fashion, advised the Court that it had *no* intention of introducing *any* results of tests performed on shrimp that were *later consumed,* (which statement of intent was accepted by the Court and formed a basis for its denial of the Petitioners' Motion), the Government, *as a matter of fact, did* offer evidence of product that was tested and later consumed. Sgt. Davis, a most important Government witness, testified that in connection with his employment as a Government inspector at T.I., he would test the product, and he would prepare worksheets to show the results of these tests. He stated that on his own he would change worksheets for product that he had inspected and rejected in order to show that the product conformed to the contract and passed inspection (Vol. XXX, p. 3272-80). Airman Sims, called as a witness by the Government, in substance, testified to the same facts as did Sgt. Davis. (Vol. SLV, p. 4944-4950). *All of the product about which Sims and Davis testified was consumed and unavailable for testing by T.I.*

The product that was tested by the Government auditors that was part of the contracts containing production Lots F6968 and F7008 that *passed* inspection was *consumed* by the Government *after* January, 1978 (Vol. 1, p. 37-94). The *"non-conforming"* product in this contract *was preserved.* The "conforming" product was unavailable for presentation before the jury. At first blush one would think that the availability of favorable tests results and unavailability of the product would be beneficial to Petitioners. This was not true in this case. Since there was no "conforming" product available to present to the jury or to have independently inspected, the Defendants were *forced* to rely on the test results obtained by Government inspec-

tors. When the Government examined Sgt. Dillman and Mr. Halladay, a civilian employee, who acted as Government auditors, and whose test results showed that the product conformed to the contract, the Government attempted to establish the lack of qualification of these Government auditors to test the product and thereby put in question the validity of the Government's test results that were *favorable* to the Defendants. (Vol. SLIX, p. 5240-44, 5264-67).

Additionally, the Government urged the jury to disregard these favorable (conforming) test results during its closing argument claiming that the Government inspectors who obtained these results were unqualified. (Vol. LXXV, pp. 7756-58, 7761, 7766-67, 7775).

In light of the fact that the Government consumed the product after it had actual knowledge that the in-plant inspection process had been subverted, it is fundamentally unfair for the Government to: (a) only test three separate contracts; (b) preserve the non-conforming product in a manner that precludes verification of the product's nonconformance by independent testing; (c) photograph the product that was tested and determined to be nonconforming before it was mishandled by the Government and have these photos presented to the jury; (d) consume the conforming product, and (e) attack, during the proceedings and in closing argument, the qualifications of the Government employees who determined the product did conform and who were the only "independent witnesses" that were available to Petitioners to establish their innocence.

The Petitioners submit that the error is of a constitutional dimension and requires reversal of the convictions.

The Defendants were placed on the horns of a dilemma by virtue of the actions of the Government. On the one

hand, Defendants attacked the expertise and credibility of the Government testers who found the product nonconforming; on the other hand, since the Defendants could not independently test the product, they had to defend the expertise and credibility of the Government testers whose test results showed conformance with the contract when the Government attacked their qualifications.

If any of the product had been: (1) properly preserved by the Government; (2) not mishandled by the Government; (3) not consumed by the Government and available for defense experts to tests; the Defendants would not have been presented with this Hobson's choice and, as evidenced by the attitude of jurors as expressed in the note to the judge, the jury never would have convicted the Defendants.

Except for the few favorable government test results (hereinabove referred to), the Defendants had no effective way of contesting by *tangible or independent evidence* the Government's presentation. All of the test results are subjective. This fact is demonstrated clearly by a careful consideration of the government audits of F6968 and F7008. These production lots were "audited" by testing by at least five different military inspectors acting independently of each other on six different occasions. (Pennington inspection TI Exh. Z 56) (Dillman & Halladay inspections TI Exh. Z 57) (Erickson inspection TI Exh. 17) (Baily inspection Vol. XL, p. 4439-75, Vol. XLI, p. 4479-4564, Vol. XLII, p. 4569-4595). *Although the production lots were all the same* (produced on the same day, in the same manner, from the same shrimp) *the test results differed greatly. The Government was able to test and retest the shrimp until they obtained the results they desired for prosecution, but the Government's conduct deprived the Defendants of a similar opportunity.*

REASONS FOR GRANTING THE WRIT

I. THE TEST TO BE APPLIED IN AND REMEDIES AVAILABLE TO DEFENDANTS IN CRIMINAL CASES WHERE THE GOVERNMENT IS RESPONSIBLE FOR THE MISHANDLING, LOSS AND/OR DESTRUCTION OF EVIDENCE ARE IN CONFLICT AMONG THE FIRST, SECOND, THIRD, FIFTH, NINTH, ELEVENTH AND D.C. CIRCUITS.

II. WHAT IS THE PROPER TEST TO PROTECT DEFENDANTS' RIGHT TO A FAIR TRIAL AND FUNDAMENTAL FAIRNESS WHEN THE GOVERNMENT DELIBERATELY MISHANDLES MATERIAL EVIDENCE LIKELY TO BE EXCULPATORY, DEPRIVING THE DEFENDANTS OF THE OPPORTUNITY TO TEST THAT EVIDENCE FOR THE CHARACTERISTICS THAT ARE THE ALLEGED FRAUD AND CONSPIRACY FOR WHICH SAID DEFENDANTS HAD BEEN INDICTED?

III. WHAT IS THE PROPER TEST TO PROTECT DEFENDANTS' RIGHT TO FUNDAMENTAL FAIRNESS WHERE THE GOVERNMENT, IN ATTEMPTING TO PROVE ITS ALLEGATIONS THAT IT WAS DEFRAUDED BY THE DEFENDANTS' SALE OF DEFECTIVE PRODUCTS TO IT, TESTS ONLY A LIMITED QUANTITY OF THE PRODUCT, DESTROYS THE TESTED SAMPLE IN THE PROCESS, AND THEN DELIBERATELY DESTROYS THE REMAINDER OF THE PRODUCT IN ITS POSSESSION, THEREBY DEPRIVING THE DEFENDANTS OF AN OPPORTUNITY TO INDEPENDENTLY TEST ANY OF THE PRODUCT?

FIRST CIRCUIT

The test applied in this circuit is three-pronged: "(F)irst, was the evidence material to the question of guilt or the degree of punishment; Second, was the defendant prejudiced by its destruction, and Third, was the Government acting in good faith when it destroyed the evidence."

United States v. Picariello, 568 F.2d 222, 227 (1st Cir. 1978). The First Circuit rule would put *the burden of showing good faith on the Government rather than on the Defendant.*

Unlike the Eleventh Circuit's *Hartley* test, the First Circuit test does not call for any "weighing" of factors and does not require the defendant to establish an "improper Government motive". The circuit squarely places the burden of showing good faith on the Government rather than on the defendant. In the First Circuit the District Court's order denying the motion to dismiss and to suppress in *Hartley* would have been overturned.

SECOND CIRCUIT

Two distinct tests are applied in this circuit. Where evidence has been lost or suppressed, the culpability of the Government is weighed against the amount of prejudice to the defendant. *United States v. Miranda,* 526 F.2d 1319 (2d Cir. 1975). In any instance where the matter is considered by an appellate court after a conviction, the court will analyze the extent of prejudice to the defendant by virtue of the loss or destruction against the extent of evidence of guilt adduced at the trial in order to determine the prejudice, if any, to the defendant.

Where evidence is destroyed in the Second Circuit, *"sanctions will normally follow, irrespective of the perpetrator's motivation, unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant." United States v. Bufalino,* 576 F.2d 446 (2d Cir. 1978). Clearly, under these tests, the District Court's order denying the motion to dismiss and to suppress in *Hartley* would be overturned.

THIRD CIRCUIT

This circuit adopts the holding of *United States v. Bryant,* 439 F.2d 642 (U.S.D.C. 1971) that "convictions may be permitted to stand only 'so long as the Government has made *"earnest efforts"* to preserve crucial materials . . ." and where the Government showed that the loss was *"harmless beyond a reasonable doubt." Government of Virgin Islands v. Testamark,* 570 F.2d 1162, 1165, 1167 (3d Cir. 1978).

In footnote 7 of *Testamark,* at 1166, the Court cites Second, Fifth and Ninth Circuit cases all as progeny of the *Bryant* case. Before the Ninth Circuit's en banc opinion in *Loudhawk,* the Panel Opinion was cited as the most recent example of this trend. Under this test, the District Court's order denying the motion to dismiss and to suppress in *Hartley* would be overturned.

FIFTH CIRCUIT

The Fifth Circuit clearly follows the propositions of law found in *United States v. Bryant, supra.* In *Armstrong v. Collier,* 536 F.2d 72 (5th Cir. 1976), the Court, in a habeas corpus proceeding instituted by a defendant who had been charged with state offenses, held that: (P 78)

> Perhaps the leading authority in this area is *United States v. Bryant,* 132 U.S. App. D.C. 142, 439 F.2d 642 (1971). The issue, as the Court defined it was *"whether intentional non-preservation by investigators* . . . of discoverable evidence amounts to its illegal suppression." Id. at 644. A tape was 'absolutely crucial to the question of appellants' guilt or innocence,' Id. at 648, had been misplaced. The record indicated that the investigators *'made no effort to preserve' the*

tape, Id. at 646 . . ., and the Court found 'at the very least a hint of bad faith . . .' Id. at 647. Examining the issues in the context of the *Jencks Act, Brady* and the Federal Rules of Criminal Procedure, the Court concluded that good faith would excuse loss of evidence, but cautioned:

> *'An exception for good faith loss of important evidence must not be allowed to swallow the discovery rules, and the burden of explanation of the Government must be a heavy one;* but criminal convictions otherwise based on sufficient evidence may be permitted to stand so long as the Government made 'earnest effort' to preserve crucial materials and to find them once a discovery request is made.'" (Emphasis added)

The right to test critical evidence is a constitutional right. *White v. Maggio,* 556 F.2d 1352 (5th Cir. 1977).

The Government never satisfied the "earnest effort" and/or "good faith" test of the Fifth Circuit and in that Circuit Petitioners' convictions would have been overturned.

NINTH CIRCUIT

The Ninth Circuit adopted an ad hoc approach to destruction of evidence cases until *United States v. Heiden,* 508 F.2d 898 (9th Cir. 1974), where it announced the rule that, where evidence has been lost or destroyed, the conviction will be overturned *if the defendant* can show "(1) Bad faith or connivance on the part of the Government, (2) that he was prejudiced by the loss of evidence." At 902.

In the vacated panel decision 628 F.2d 1139 (9th Cir. 1979) (en banc) in *United States v. Hawk,* (original Opinion is unpublished) (vacated on other grounds), the majority's reasoning was similar to that of the D.C. Circuit:

> "A presumption of prejudice in favor of the Appellees is the only means available to protect them from the unfairness that inheres in the Government's unilateral choice in placing that evidence completely beyond the appellees' and the Court's reach."

Thus, the panel kept *Heiden, supra,* intact, but held that where *the Government could offer no good excuse* for its good faith actions *and its destruction of evidence precluded the defense from proving prejudice by examining the material destroyed, the burden of proof would shift to the Government to show a lack of prejudice.* The dissent in the *en banc* opinion points out:

> "The majority opinion correctly recognizes that we are pursuing separate and distinct interest in situations of this kind: deterring Governmental misconduct, protecting a Defendant's right to a fair trial, and preserving the integrity of the judicial process. None of these interests is appropriately protected by balancing one of these interests against the other. Each of the interests is independently important, and none of them can be weighed against the others. Thus, for example, we have no interest whatever in injuring a Defendant's right to a fair trial to reward Governmental innocence in destroying evidence."

In the Ninth Circuit Petitioners' convictions would have been vacated.

D.C. CIRCUIT

The D.C. Circuit's leading cases are *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971) and *United States v. Bryant,* 448 F.2d 1182 (D.C. Cir. 1971). The *Bryant* cases commanded a "pragmatic balancing approach" where the District Court is directed to:

> ". . . weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that would serve the ends of justice." 448 F.2d at 1183.

The D.C. Circuit sees *Bryant's "good faith exception" applying only in circumstances where there are "rigorous and systematic procedures designed to preserve all discoverable evidence." United States v. Butler,* 499 F.2d 1006, 1008 (D.C. Cir. 1974). *See also United States v. Harrison,* 524 F.2d 421 (D.C. Cir. 1975).

Further, the D.C. Circuit does not require a showing of actual prejudice, but a "significant probability of prejudice," which "might have led the jury to entertain a reasonable doubt about (Defendant's) guilt." *United States v. Butler, supra.* The D.C. Circuit has not required a showing of actual prejudice in order for the defendant to obtain relief.

The D.C. Circuit also views the destruction or loss of potentially exculpatory material as a due process violation in and of itself. *United States v. Quivers,* 539 F.2d 744 (D.C. Cir. 1976).

Since there was was a significant probability that Petitioners were prejudiced by the mishandling and destruction of the evidence, which, under the circumstances of this case might have led the jury to entertain a reasonable doubt as to Petitioners' guilt, in the D.C. Circuit Petitioners' convictions would have been set aside.

ELEVENTH CIRCUIT

The panel opinion of the Eleventh Circuit which is a basis for this petition for writ of certiorari, on page 1677 held that:

> "the Fifth Circuit has developed a 'bad faith' test. Absent an indication of 'improper Government motive,' the Court has consistently refused to find a Due Process violation sufficient to warrant reversal." *Armstrong v. Collier, supra.*

Contrary to the aforesaid quotation from the Panel Opinion, neither the Fifth Circuit nor any other circuit has required the defendant to prove the Government's bad faith. The Fifth Circuit has adopted the test in the D.C. Circuit, as set forth in *U.S. v. Bryant, supra,* which imposes on the Government a burden of good faith and a responsibility to make an earnest effort to preserve the evidence, neither of which requirements of law were satisfied in the proceedings below.

In *Hartley,* the Eleventh Circuit has announced *a new test, unlike that of any other circuit,* that requires the defendant to prove the Government's "bad faith" and its "improper motive." In *Hartley,* the Court has inexplicably required the defendant to come up with proof that the Government itself has destroyed and mishandled and has shifted the burden of proof to the defendant which under the circumstances of this case, is inconsistent with the presumption of innocence afforded all defendants in criminal prosecutions and is therefore unconstitutional.

SUPREME COURT

All of the circuits dealing with the destruction, loss or mishandling of evidence recognize that any test devised must be created in light of a defendant's constitutional due process rights. In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) this Court held that:

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either

to guilt or punishment, *irrespective of the good faith or bad faith of the prosecution.*" (Emphasis added.)

The aforesaid precedent established by this Court requires reversal of Petitioners' convictions.

LAW REVIEW ARTICLES

Two recent Law Review comments regarding the loss and/or destruction of evidence fully support the Petitioners' contentions that the trial court and the Eleventh Circuit erred. *Judicial Response to Governmental Loss or Destruction of Evidence,* 39 U. of Chi. L. Rev. 542, (1971-72); *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine.* 75 Colum. L. Rev. 1355 (1975).

It must be remembered that, not only did the Government destroy evidence, it also failed to keep the small amount it preserved in a condition that allowed it to be independently tested.

As is clear from the above, the circuits are widely split as to the proper test to be applied in destruction and mishandled evidence cases — What factors should be considered? Should they be weighed, or not? Is the Government's good faith or bad faith of any significance when the destroyed and/or mishandled evidence is potentially exculpatory? Which side has a burden on which issue?

Because of the importance of the issue herein to the administration of criminal law throughout the district courts arising from the frequency with which the issue is continuously addressed, it is most important that this Court clearly resolve the divergence of opinions and set the standard for destruction and mishandled evidence cases that will not permit the abuses that the record in this case shows was imposed upon petitioners.

IV. DOES THE CIRCUIT COURT TEST IN *HARTLEY* SUFFICIENTLY RECOGNIZE AND PROTECT THE CONSTITUTIONAL RIGHTS OF DEFENDANTS WHERE THE GOVERNMENT HAS MISHANDLED MATERIAL EVIDENCE THAT IS LIKELY TO BE EXCULPATORY THEREBY DEPRIVING THE DEFENDANTS OF THE OPPORTUNITY TO TEST THE EVIDENCE FOR THE CHARACTERISTICS ALLEGED IN THE INDICTMENT TO CONSTITUTE THE ELEMENTS OF THE FRAUDS AND CONSPIRACY CHARGED?

V. THERE IS A SIGNIFICANT ARGUMENT THAT THE ELEVENTH CIRCUIT TEST IN *HARTLEY* FAILS TO RECOGNIZE THE DUE PROCESS IMPLICATIONS OF THE DESTRUCTION AND MISHANDLING OF EVIDENCE THAT IS POTENTIALLY EXCULPATORY.

VI. DOES THE TEST IN *HARTLEY* RECOGNIZE AND PROTECT DEFENDANTS' RIGHTS TO DUE PROCESS OF LAW WHEN THE GOVERNMENT HAS DESTROYED AND MISHANDLED POTENTIALLY EXCULPATORY EVIDENCE, THEREBY PRECLUDING THE DEFENDANT FROM INDEPENDENTLY TESTING THE EVIDENCE FOR THE CHARACTERISTICS ALLEGED IN THE INDICTMENT TO CONSTITUTE THE ELEMENTS OF THE FRAUDS AND CONSPIRACY CHARGED?

In the Eleventh Circuit *Hartley* opinion there appears no understanding that when material and potentially exculpatory evidence is either destroyed or mishandled there may be both a statutory violation and a violation of the Defendants' rights under the Fifth Amendment Due Process Clause. Cases on destruction of evidence, even in the Fifth Circuit, recognize that any test devised must be created in the light of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) because "it must be

remembered that *Brady* is a constitutional mandate." *United States v. Beasley,* 576 F.2d 626, 630 (5th Cir., 1978). As the Seventh Circuit pointed out: "[a] defendant's right to prepare the best defense he can and to bring to the Court's attention any evidence helpful to this case is constitutionally protected." The Supreme Court in *Brady v. Maryland, supra,* recognized the right of a defendant to have access to exculpatory evidence in the hands of a prosecutor. We believe a defendant also has the right to preserve possibly exculpatory evidence and that, to the extent the Government or its agents frustrate such preservation, the defendant has a constitutional claim." *McDonald v. State of Illinois,* 557 F.2d 596, 603 (7th Cir. 1977).

Unlike all other circuits that have considered this issue, the Eleventh Circuit fails to see that defendants' due process rights cannot be ignored merely because the defendants have been unable to prove that the Government has acted in bad faith.

Perhaps it is proper to consider factors about the quality of Government conduct in fashioning a sanction for a violation of defendants' due process rights, but such factors should not be permitted to poison an analysis of whether the defense has been denied an opportunity to bring to the jury's attention evidence that may be exculpatory.

A defendant's constitutional right to a fair trial is not a mere "interest" to be weighed, but a right to be protected.

The Eleventh Circuit test in *Hartley* fails to see the constitutional implications of destruction and mishandling of material and/or essentially exculpatory evidence, it prejudices and, in fact, ignores a defendant's Fifth Amendment rights to due process and, as such, should be scrutinized by this Court.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeals placed an unrealistic and impossible burden on Petitioners in this criminal case to demonstrate prejudice, improper Government motive, and bad faith where the Government intentionally destroyed and mishandled relevant and material evidence. This is an unconstitutional and illogical placement of the burden of proof. There are substantial disagreements among the various circuits as to what standard should be applied. Such a fundamental issue should not be allowed to remain unresolved among the circuits. For this reason, this Court should accept certiorari in this case to resolve the conflict between the circuits and clarify the Eleventh Circuit's "bad faith test" and "improper Government motive test" in light of the tests pronounced in the other appellate circuits, and also to resolve the issue of who has the burden of going forward with the evidence of prejudice, good faith, bad faith, motive and negligence in a destruction and/or mishandling of evidence case.

Respectfully submitted,

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